

***United States Court of Appeals
for the Second Circuit***



APPENDIX

75-7002

United States Court of Appeals

For the Second Circuit.

ULMONT O. CUMMING, JR.,

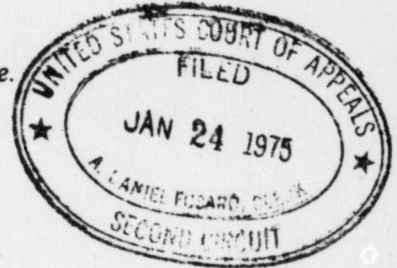
Plaintiff-Appellant,

-against-

SELMA ELLISON a/k/a SELMA HERSHFELD,

Defendant-Appellee.

*On Appeal from The District Court of the United States
For The Southern District of New York*



JOINT APPENDIX

ULMONT O. CUMMING, JR.,
Plaintiff-Appellant, Pro Se
c/o NYHLR, Limited
14 East 60th Street, Suite 502
New York, New York 10022

NEWMAN, ARONSON & NEUMANN,
Attorneys for Defendant-Appellee
350 Fifth Avenue
New York, New York 10001

PAGINATION AS IN ORIGINAL COPY

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AMENDED COMPLAINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x

ULMONT O. CUMMING, JR.,

Plaintiff,

--against--

SELMA ELLISON a/k/a SELMA HERSHFELD,

Defendant.

:
: AMENDED COMPLAINT

:
: No. 74-CIV-84-CHT

:
: JURY TRIAL REQUESTED

-----x

PRELIMINARY STATEMENT

1. This is an action for a declaratory judgment, a writ of injunction and compensatory damages pursuant to Section 210(a) of the Economic Stabilization Act of 1970 as amended, to protect and redress for certain legal wrongs suffered by the plaintiff due to certain acts and practices of the defendant arising out of said Act, or any order or regulation issued pursuant thereto. The plaintiff also seeks punitive damages.

2. By this proceeding plaintiff seeks a judgment declaring that defendant invaded a right of the plaintiff provided for and protected by 6 CFR 301 et seq. (1972) issued pursuant to the Economic Stabilization Act of 1970 as amended and that: A legally protected right of the plaintiff has been abridged by the defendant.

AMENDED COMPLAINT

3. By this proceeding plaintiff seeks a writ of injunction against the defendant prohibiting and restraining the defendant from, either directly or indirectly, interfering in plaintiff's occupancy and quiet enjoyment of his residence in the third floor front apartment of premises known as and by the street number 42 East 64th Street, Borough of Manhattan, City, County and State of New York, within the territorial jurisdiction of this Court.

4. By this proceeding plaintiff seeks, pending the determination of this action, a temporary restraining order and preliminary injunction, prohibiting and restraining the defendant from, either directly or indirectly, interfering in plaintiff's occupancy and quiet enjoyment of his residence in the third floor front apartment of premises known as and by the street address 42 East 64th Street, Borough of Manhattan, City, County and State of New York, within the territorial jurisdiction of this Court.

5. By this proceeding plaintiff also seeks monetary damages from defendant to compensate plaintiff for his loss of income, attorney's fees and disbursements, moving and storage expenses, rental overcharges, rental of substitute residence and for substantial mental and emotional distress, all of which plaintiff incurred as a direct result of defendant's abridgement of a

AMENDED COMPLAINT

legally protected right of the plaintiff. Plaintiff finally seeks punitive monetary damages from defendant for her wrongful, malicious and tortious actions and harassment of plaintiff in willful disregard of his legal rights.

JURISDICTION

6. Jurisdiction is conferred upon this Court by Section 210(a) of the Economic Stabilization Act of 1970, as amended as an action to redress an individual suffering a legal wrong because of any act or practice arising out of said Act, or any order or regulation issued pursuant thereto.

PLAINTIFF

7. The plaintiff, Ulmont O. Cumming, Jr., is 48 years of age and until his eviction from his home on July 6th, 1973, resided at number 42 East 64th Street, Borough of Manhattan, City, County and State of New York, within the territorial jurisdiction of this Court.

8. On or about the 1st day of November 1958, plaintiff leased the subject apartment from defendant pursuant to a written lease.

9. Said lease was thereafter renewed numerous times.

AMENDED COMPLAINT

10. Thereafter and on or about the 27th day of October, 1969, plaintiff again leased the subject apartment from defendant pursuant to a written lease to commence on the 1st day of November, 1969, and to terminate on the 31st day of October, 1971 at the monthly rental of \$150.00.

11. Subsequently, and on or about the 8th day of October, 1971, defendant informed plaintiff that effective the 1st day of November, 1971, his rent would be increased by \$25.00 per month. Defendant failed to inform plaintiff of his right to a lease renewal at a rental within the range provided by 6 CFR 301.208 and further defendant failed to offer such a lease renewal to plaintiff.

12. Theretofore, plaintiff always paid his rent on time and behaved properly.

13. Thereafter, plaintiff objected to the rent increase and claimed that such increase violated the "Presidential Freeze on Rents." However, when the defendant threatened plaintiff with eviction, should the new rent not be paid, the plaintiff did pay the rent at the rate of \$175.00 for November of 1971.

14. Immediately thereafter and on or about the 1st day of November, 1971, plaintiff filed a complaint with the Internal Revenue Service, an agency of the United States Government, alleging that defendant violated the Economic Stabilization Act of 1970, as amended.

AMENDED COMPLAINT

15. The subject apartment was and still is not subject to any rent control or stabilization pursuant to any City or State law or ordinance.

16. On or about the 11th day of November, 1971, defendant expressed to plaintiff "shock" at plaintiff's complaint to the Internal Revenue Service of defendant's alleged rent increase.

17. In retaliation to plaintiff's filing a complaint to the Internal Revenue Service of defendant's violation of 6 CFR 301 et seq., defendant commenced summary proceedings to dispossess the plaintiff in clear violation of 6 CFR 301.502(f) which prohibits any retaliatory action by a landlord against a tenant for exercising his rights under the Economic Stabilization Act of 1970, as amended.

18. Plaintiff thereafter requested of defendant the reason for the thirty-day notice upon which defendant predicated her state court summary dispossession proceeding and defendant refused to answer.

19. Defendant subsequently prevailed in the dispossession proceeding in the trial court which refused to honor plaintiff's affirmative defense of retaliatory eviction.

AMENDED COMPLAINT

20. Thereafter and on or about the 6th day of July, 1973, plaintiff was evicted from his residence by a City Marshal pursuant to an execution issued upon the dispossess judgment entered against him in the State Court.

21. Thereafter and on or about the 14th day of November, 1973, the State Appellate Court unanimously reversed the judgment of the trial court and dismissed the action holding that the defendant was mandated by the Economic Stabilization Act of 1970, as amended, to offer a renewal lease to the plaintiff and that absent this tender the plaintiff was not wrongfully holding over and the dispossess proceeding could not be maintained as the landlord could not show a right to possession.

22. Subsequent to the entry of said appellate court order, the plaintiff demanded of the defendant the return of his apartment and the defendant refused and continued to refuse to return possession of same to the plaintiff.

DEFENDANT

23. Upon information and belief, the defendant is a spinster of approximately seventy-three years of age who is presently residing in the subject apartment. Upon information and belief the defendant SELMA ELLISON is also known as SELMA HERSHFELD.

AMENDED COMPLAINT

STATUTORY SCHEME

24. The Economic Stabilization Act of 1970, as amended (6 CFR 301.208, subd. b, Sections 1 and 2) mandated that a landlord in such circumstances offer a renewal lease to the tenant.

25. Section 210(a) of the Economic Stabilization Act of 1970, as amended, provides the basis of an action to redress an individual suffering a legal wrong because of an act or practice arising out of said act or any order or regulation issued pursuant thereto.

STATEMENT OF CLAIM

26. Briefly stated, defendant raised plaintiff's rent in excess of the amount allowable under the Economic Stabilization regulations, 6 CFR Part 301 et seq. (1972). After discussing the increase with the defendant and studying the defendant's justification for the rent increase, the plaintiff reported the rent overcharge to the Internal Revenue Service, but paid the increased rent. The tenant was thereafter evicted.

27. Such retaliatory action by a landlord against a tenant for exercising his rights under the Economic Stabilization Act of 1970, as amended, is prohibited by 6 CFR 301.502(f).

AMENDED COMPLAINT

28. Such retaliatory eviction of a tenant, who has complained to the Government about illegal rental increases, not only punishes the tenant for making a complaint, which he has a constitutional right to make, but also stands as a warning to others that they dare not be so bold. Retaliatory evictions under such circumstances are a perversion of the congressional purpose in enacting the Economic Stabilization Act of 1970, as amended.

29. This action is expressly authorized by Section 210(a) of the Economic Stabilization Act of 1970, as amended, for the damages plaintiff, as a tenant, has incurred as a result of the said eviction proceedings, which provides:

"Any person suffering a legal wrong because of any act or practice arising out of this title, or any order or regulation issued pursuant thereto may bring an action in a district court of the United States, without regard to the amount in controversy, for appropriate relief, including an action for declaratory judgment, writ of injunction (subject to the limitations in Section 211), and/or damages."

30. A "legal wrong", as used in the statute, includes the invasion of a right provided for and protected by 6 CFR Part 301 et seq. (1972) issued pursuant to the Economic Stabilization Act of 1970, as amended.

AMENDED COMPLAINT

31. When a landlord takes retaliatory eviction action against a tenant as a result of the tenant's complaint to the Government of alleged rent increases, the tenant's right to report violations as provided in 6 CFR 301 et seq. (1972) has been abridged.

32. Accordingly, plaintiff has suffered a legal wrong and this suit is so authorized pursuant to Section 210(a) of the Act.

DAMAGE

33. Plaintiff seeks monetary compensation from defendant for damages incurred by plaintiff as a direct result of the legal wrongs suffered by the plaintiff due to the aforesaid acts and practices of the defendant arising out of the Economic Stabilization Act of 1970, as amended, or any order or regulation issued pursuant thereto as follows: \$25,000.00 for the plaintiff's loss of income from his job; \$20,000.00 for the plaintiff's attorney's fees, secretarial services and disbursements incurred in the State court litigation and in the prosecution of this action; moving and storage fees estimated in the sum of \$1,000.00; trouble damages on rental overcharges set by the Statute at \$1,000.00; \$4,500.00 for the rental of a suitable residence during the time in which plaintiff has been denied access to his residence; the sum of

AMENDED COMPLAINT

\$3,000,000.00 for substantial mental and emotional distress caused by the defendant's abridgement of plaintiff's legally protected rights.

34. Plaintiff further seeks punitive monetary damages from the defendant in the sum of \$3,000,000.00 for her wrongful, malicious and tortious actions and harassment of plaintiff in willful disregard of his legal rights.

WHEREFORE, plaintiff respectfully prays that this court:

1. Enter pending the termination of this action a temporary restraining order and preliminary injunction, enjoining, prohibiting and restraining the defendant, her agents, servants and employees, from directly or indirectly interfering in plaintiff's occupancy and quiet enjoyment of his residence in the third floor front apartment in premises known as and by the street address, 42 East 64th Street, Borough of Manhattan, City, County and State of New York.

2. Enter a permanent injunction restraining, enjoining and prohibiting the defendant, her agents, servants and employees, from directly or indirectly interfering in plaintiff's occupancy and quiet enjoyment of his residence in the third floor front apartment in premises known as and by the street address, 42 East 64th Street, Borough of Manhattan, City, County and State of New York.

AMENDED COMPLAINT

3. Award to the plaintiff compensatory and punitive monetary damages to be paid by defendant in the total sum of \$6,051,500.00.

4. Allow the plaintiff his costs herein, together with reasonable attorney's fees for the prosecution of this action, and such additional and further relief as to this court may appear just and equitable.

Dated: New York, New York

April 16th, 1974

Respectfully submitted,

/s/ Ulmont O. Cumming, Jr.

ULMONT O. CUMMING, JR.
Plaintiff - Pro Se
Office & P.O. Address:
c/o NYILR, Limited
14 East 60th Street
New York, New York 10022
Telephone: (212) 421-1644

AMENDED COMPLAINT

VERIFICATION

STATE OF NEW YORK)
CITY OF NEW YORK : ss.:
COUNTY OF NEW YORK)

ULMONT O. CUMMING, JR., being duly sworn, according
to law, deposes and says:

That he is the Plaintiff in the within action; that
he has read the foregoing Complaint; that he knows the contents
thereof; that the same are true to his own knowledge and belief,
except as to those matters therein alleged upon information
and belief, and as to those matters, he believes them to be
true.

/s/ Ulmont O. Cumming, Jr.
ULMONT O. CUMMING, JR.

Sworn to before me this

16th day of April, 1974.

/s/ William L. Darrow

WILLIAM L. DARROW
Notary Public, State of New York
No. 60-5922615
Qualified in Westchester County
Commission Expires March 30, 1976

ANSWER TO AMENDED COMPLAINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
ULMONT O. CUMMING, JR., : CIVIL ACTION
Plaintiff, :
--against-- : FILE #74CIV 840 T
SELMA ELLISON a/k/a SELMA HERSHFELD, :
Defendant. :
-----X

To Ulmont O. Cumming, Jr..

PLEASE TAKE NOTICE that the defendant, SELMA
ELLISON, by her attorneys, Newman, Aronson & Newman (sic), for
answer to the amended complaint, answers as follows:

ANSWERING THE PRELIMINARY
STATEMENT

1. Denies any knowledge or information sufficient
to form a belief as to each and every allegation marked and
designated in paragraphs "1" through "5" inclusive.

ANSWERING THE ALLEGATION
OF JURISDICTION

2. Denies each and every allegation marked and
designated "6".

ANSWER TO AMENDED COMPLAINT

ANSWERING THE ALLEGATION
MARKED "PLAINTIFF"

3. Denies any knowledge or information sufficient to form a belief as to the Plaintiff's age contained in paragraph marked and designated "7".

4. Denies each and every allegation marked and designated "11", "12", "13", "15", "16", "17", "18", "19", "21", and "22".

5. Denies any knowledge or information sufficient to form a belief as to the paragraph marked and designated "14".

ANSWERING THE STATUTORY
SCHEME

6. Denies each and every allegation marked and designated "24" and "25".

ANSWERING THE STATEMENT
OF CLAIM

7. Denies each and every allegation marked and designated "26", "27", "28", "29", "30", "31", and "32".

ANSWERING THE ALLEGATION
OF DAMAGES

8. Denies each and every allegation marked and designated "33" and "34".

ANSWER TO AMENDED COMPLAINT

AS AND FOR A FIRST AFFIRMATIVE
DEFENSE

9. The Court lacks jurisdiction of the subject matter.

AS AND FOR A SECOND AFFIRMATIVE
DEFENSE

10. Plaintiff had elected to pursue his remedies in the courts of the State of New York which had jurisdiction of the cause of action herein. Defendant has complied fully with the Order of the Appellate Term of the Supreme Court of the State of New York, First Department, which denied plaintiff's motion for restitution and referred the question of restitution and damages to Judge Burton S. Sherman of the Civil Court of the City of New York. On January 22, 1974, Judge Sherman denied restitution to the plaintiff and provided for payment of storage and moving costs which defendant has paid in full. The Order and Judgemnt of Judge Sherman, as aforesaid, is final and conclusive upon the plaintiff herein.

AS AND FOR A THIRD AFFIRMATIVE
DEFENSE

11. The course of conduct and behavior of the plaintiff during his tenancy justified defendant's action to evict him.

ANSWER TO AMENDED COMPLAINT

WHEREFORE, defendant demands judgment dismissing the complaint herein together with costs and disbursements of this action.

Dated: New York, New York
April 26, 1974

NEWMAN, ARONSON & NEUMANN, Esqs.

By: /s/ Murray Spellman
Murray Spellman, Esq.
Associate of the Firm
Attorneys for the Defendant,
350 - Fifth Avenue
New York, New York 10001
Tel - 695-5575

ANSWER TO AMENDED COMPLAINT

VERIFICATION

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

SELMA ELLISON, being duly sworn, according to law,
deposes and says:

That she is the defendant in the within action; that
she has read the foregoing Amended Answer; that she knows the
contents thereof; that the same are true to her knowledge and
belief, except as to those matters therein alleged upon informa-
tion and belief and as to those matters, she believes them to be
true.

/s/ Selma Ellison
SELMA ELLISON

Sworn to before me

this 26 day of April, 1974.

/s/ Murray Spellman

Murray Spellman
Notary Public, State of New York
No. 41-9121075
Qualified in Queens County
Commission Expires March 30, 1976

NOTICE OF MOTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
ULMONT O. CUMMING, JR.,

Plaintiff,

--against--

SELMA ELLISON a/k/a SELMA
HERSHFELD,

Defendant.

: No. 74-CIV-84-CHT

: NOTICE OF MOTION
FOR PARTIAL

: SUMMARY JUDGMENT

:

:

-----X
S I R S :

PLEASE TAKE NOTICE, that upon the amended complaint duly verified the 16th day of April, 1974, the answer to the amended complaint, duly verified the 26th day of April, 1974, the order of this Court entered April 12th, 1974, granting plaintiff's motion for leave to serve and file an amended complaint, the order of this Court entered May 2nd, 1974, denying plaintiff's motion for a preliminary injunction, the order of this Court entered June 27th, 1974, denying plaintiff's motion for summary judgment on the issue of liability alone and defendant's cross-motion for dismissing the complaint, the papers upon which said

NOTICE OF MOTION

orders were based, the annexed affidavit of Ulmont O. Cumming, Jr., duly sworn to the 27th day of September, 1974, and the exhibit annexed thereto and made a part thereof, and upon all prior papers, pleadings and proceedings heretofore had herein, the undersigned will move this Court, pursuant to the provisions of Rule 56 of the Federal Rules of Civil Procedure, in Room 1904 of the Court House thereof, located at Foley Square, City, County and State of New York on the 18th day of October, 1974, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as the undersigned can be heard, for an order directing that the defendant return possession of the subject apartment to the plaintiff and that partial summary judgment be entered in favor of the plaintiff and against the defendant on the issue of the right to possession of the subject apartment, upon the ground that there is no genuine defense to plaintiff's cause of action seeking possession of the subject apartment, and for such other, further and different relief in the premises as to this Honorable Court may appear just and proper.

NOTICE OF MOTION

PLEASE TAKE FURTHER NOTICE, that pursuant to the provisions of Rule 6, Sections (d) and (e) of the Federal Rules of Civil Procedure, answering affidavits and any other papers to be used in opposing this motion, if any, shall be served upon the undersigned at least one (1) day before the return date hereof, unless such service is made by mail and in that event such service shall be made upon the undersigned at least four (4) days before the return date hereof.

Dated, New York, New York, this 27th day of September, 1974.

Yours, etc.

/s/ ULMONT O. CUMMING, JR.
ULMONT O. CUMMING, JR.
Plaintiff Appearing Pro Se
Office & P.O. Address
c/o N.Y.I.L.R. Limited
14 East 60th Street
New York, New York 10022
Telephone: (212) 421-1644

TO:

MESSRS. NEWMAN, ARONSON AND NEUMANN
Attorneys for the Defendant
350 Fifth Avenue
New York, New York 10001

AFFIDAVIT OF ULMONT O. CUMMING, JR., SWORN TO ON
SEPTEMBER 27TH, 1974, IN SUPPORT OF MOTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x

ULMONT O. CUMMING, JR.,

Plaintiff,

--against--

SELMA ELLISON a/k/a SELMA
HERSHFELD,

Defendant.

: No. 74-CIV-84-CHT

:

: AFFIDAVIT IN SUPPORT
: OF MOTION FOR
: PARTIAL SUMMARY JUDGMENT

:

:

-----x

STATE OF NEW YORK)
CITY OF NEW YORK : ss.:
COUNTY OF NEW YORK)

ULMONT O. CUMMING, JR., being duly sworn,
according to law, deposes and says:

1. I am the plaintiff, appearing pro se,
in the above-entitled action and, with personal
knowledge of the facts and circumstances hereinafter
set forth, submit this affidavit in support of plaintiff's
motion pursuant to the provisions of Rule 56 of the Fed-
eral Rules of Civil Procedure, for an order directing
that the defendant return possession of the subject
apartment to the plaintiff and that partial summary
judgment be entered in favor of the plaintiff and

AFFIDAVIT OF ULMONT O. CUMMING, JR., SWORN TO ON
SEPTEMBER 27TH, 1974, IN SUPPORT OF MOTION

against the defendant on the issue of the right to possession of the subject apartment, upon the ground that there is no genuine defense to plaintiff's cause of action seeking possession of the subject apartment.

2. This is an action for declaratory judgment, a writ of injunction and compensatory damages pursuant to Section 210(a) of the Economic Stabilization Act of 1970, as amended, to protect and redress for certain legal wrongs suffered by the plaintiff due to certain acts and practices of the defendant arising out of said Act, or any order or regulation issued pursuant thereto.

3. The plaintiff also seeks punitive damages.

4. By leave sought and received, an amended complaint was duly filed herein, verified the 16th day of April, 1974, and subsequently an answer to the amended complaint was filed herein, duly verified the 26th day of April, 1974.

5. I verily believe that there is no defense to plaintiff's cause of action.

6. The facts and circumstances upon which

AFFIDAVIT OF ULMONT O. CUMMING, JR., SWORN TO ON
SEPTEMBER 27TH, 1974, IN SUPPORT OF MOTION

plaintiff's cause of action arose are incorporated by reference from all of the affidavits previously submitted on plaintiff's prior applications for orders granting leave to serve and to file an amended complaint, for preliminary injunction, and for partial summary judgment on the issue of liability. Additionally, and to supplement the prior papers heretofore submitted to this Court on previous motions, upon information and belief, plaintiff has been informed that the investigation completed by the Internal Revenue Service resulted in the finding that the rent increase made by the defendant to the plaintiff effected on November 1st, 1971, was a violation of the Economic Stabilization Program. The source of plaintiff's information and belief is a letter received from the Internal Revenue Service, a copy of which is annexed hereto and made a part hereof as Exhibit A.

7. Pursuant to Local Rule 56(g), annexed hereto and made a part hereof as an exhibit is a statement of facts upon which the plaintiff predicates this application and which plaintiff respectfully

AFFIDAVIT OF ULMONT O. CUMMING, JR., SWORN TO ON
SEPTEMBER 27TH, 1974, IN SUPPORT OF MOTION

submits are the only essential elements necessary on that portion of plaintiff's cause of action seeking possession of the subject apartment. Each and every fact contained in the annexed statement pursuant to Local Rule 56(g) is incorporated herein by reference and the truth of which is accordingly attested.

8. It is respectfully submitted that the evidentiary facts together with the documentary evidence presented establish a cause of action sufficiently to entitle plaintiff to summary judgment on the limited issue as to the right to possession of the subject apartment.

9. No previous application has been made for the same or similar relief, except one prior motion for partial summary judgment on the issue of liability alone.

WHEREFORE, it is respectfully submitted that an Order be made and entered herein directing that the defendant return possession of the subject apartment to the plaintiff and that partial summary judgment be entered in favor of the plaintiff and against the defendant on the issue of the right to possession of the subject apartment, upon the ground that there is no

AFFIDAVIT OF ULMONT O. CUMMING, JR., SWORN TO ON
SEPTEMBER 27TH, 1974, IN SUPPORT OF MOTION

genuine defense to the plaintiff's cause of action seeking possession of the subject apartment, and for such other, further and different relief in the premises as to this honorable Court may appear just and proper.

/s/ ULMONT O. CUMMING, JR.
ULMONT O. CUMMING, JR.

Sworn to before me this
27th day of September, 1974.

/s/ HERMAN A. STUHL
HERMAN A. STUHL
Notary Public, State of New York
No. 31-9230450
Qualified in New York County
Commission Expires March 30, 1976.

EXHIBIT A ANNEXED TO AFFIDAVIT OF ULMONT O. CUMMING, JR., SWORN
TO ON SEPTEMBER 27th, 1974, IN SUPPORT OF MOTION -- LETTER FROM
THE INTERNAL REVENUE SERVICE DATED JUNE 24th, 1974, TO ULMONT O.
CUMMING, JR.

Address any reply to: P.O. Box 3036, New York, N.Y. 10008

Department of the Treasury

District Director

Internal Revenue Service

Date:

JUN 24 1974

In reply refer to:

TS:TI:F. MENTO

(212) 466-1766

Mr. Ulmont Cumming
14 East 60th Street Suite 502
New York, New York 10022

Dear Mr. Cumming:

This is in reply to your letter of May 16, 1974 inquiring about
the status of our investigation of your complaint against
Miss Selma Ellison.

Our investigation of this matter was completed and resulted in
a finding that the \$25.00 increase in monthly rent effected on
November 1, 1971 was a violation of the Economic Stabilization
Program. This means that you are entitled to a refund of the
overcharge for each month that you paid it from November 1971
through January 1973 (rent control under the Economic Stabili-
zation Program was ended in January 1973).

Since Miss Ellison has indicated that she will not willingly
refund the overcharge, you will have to take the necessary
legal action if you wish to enforce collection under the
provisions of Section 210 of the Economic Stabilization Act of
1970, as amended. The court having jurisdiction of the parties
and subject matter in this case is the Federal District Court
for the Southern District of New York, Foley Square, New York
City.

We are unable to take any action in your behalf, since the
Economic Stabilization Program has terminated on April 30, 1974.

Sincerely yours,

Michael Green
Chief, Stabilization Division

EXHIBIT B ANNEXED TO AFFIDAVIT OF ULMONT O. CUMMING, JR.,
SWORN TO SEPTEMBER 27TH, 1974, IN SUPPORT OF MOTION --
STATEMENT OF FACTS PURSUANT TO LOCAL RULE 56(g)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x

ULMONT O. CUMMING, JR.,	:	
Plaintiff,	:	No. <u>74-CIV-84-CHT</u>
--against--	:	
SELMA ELLISON d/b/a SELMA	:	STATEMENT OF FACTS
HERSHFELD,	:	PURSUANT TO LOCAL
	:	<u>RULE 56(g)</u>
Defendant.	:	

-----x

1. Plaintiff resided in the apartment in question from approximately November 1st, 1958 until July 6th, 1973.

2. During that time, the lease covering the apartment had been renewed numerous times, the final lease running from November 1st, 1969 to October 31st, 1971, at a monthly rental of \$150.00.

3. During October of 1971, defendant notified plaintiff that the monthly rental would be increased \$25.00.

4. Plaintiff objected to the proposed increased (sic) on the grounds that it violated the "Presidential

EXHIBIT B ANNEXED TO AFFIDAVIT OF ULMONT O. CUMMING, JR.,
SWORN TO SEPTEMBER 27TH, 1974, IN SUPPORT OF MOTION --
STATEMENT OF FACTS PURSUANT TO LOCAL RULE 56(g)

Freeze on Rents" (Executive Order No. 11, 615, 3 C.F.R.,
Section 199).

5. Immediately thereafter plaintiff filed a
complaint with the Internal Revenue Service.

6. The Internal Revenue Service investigation
resulted in a finding that the \$25.00 increase in
monthly rent effected on November 1st, 1971 was a vio-
lation of the Economic Stabilization Program.

7. The defendant was required by law to offer
plaintiff a renewal lease pursuant to the Economic
Stabilization Act of 1970, as amended and a determination
as to this fact is now res judicata pursuant to the
order of New York Supreme Court, Appellate Term, 1st
Department.

8. The defendant did not offer the plaintiff
a renewal lease.

9. On the contrary, defendant caused the
eviction of the plaintiff on the ground that plaintiff's
lease had expired and that he was holding over beyond
his term.

10. The judgment pursuant to which plaintiff
was evicted was unanimously reversed by the New York

EXHIBIT B ANNEXED TO AFFIDAVIT OF ULMONT O. CUMMING, JR.,
SWORN TO SEPTEMBER 27TH, 1974, IN SUPPORT OF MOTION --
STATEMENT OF FACTS PURSUANT TO LOCAL RULE 56(g)

Supreme Court, Appellate Term, 1st Department.

11. The Act permits a Federal suit to compel compliance.

12. The Court has subject matter jurisdiction; the complaint states a cause of action; and the cause of action stated in the complaint is not barred on the theory of election of remedies.

AFFIDAVIT OF MURRAY SPELLMAN SWORN TO NOVEMBER 5TH,
1974, IN OPPOSITION TO MOTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x

ULMONT O. CUMMING, JR.,

Plaintiff,

--against--

SELMA ELLISON a/k/a SELMA
HERSHFELD,

Defendant.

: No. 74-CIV-84-CHT

:

: AFFIDAVIT IN
: OPPOSITION

:

:

-----x

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

MURRAY SPELLMAN, being duly sworn, deposes and
says:

That he is an attorney-at-law and of counsel
to the attorneys for the defendant. That he has been
in charge of this case since its inception in this
office. Deponent makes this affidavit in opposition
to the motion by the plaintiff for an order directing
that the defendant return possession of the subject
apartment to the plaintiff and that partial summary
judgment be granted on the issue of the right of pos-
session of the aforesaid subject apartment.

AFFIDAVIT OF MURRAY SPELLMAN, SWORN TO NOVEMBER 5TH,
1974, IN OPPOSITION TO MOTION

This is the third motion brought by the plaintiff for summary judgment. Plaintiff has barely made reference to the prior motions. In plaintiff's Notice of Motion reference is made to the order of this Court entered on May 2, 1974 denying plaintiff's motion for a preliminary injunction. Plaintiff did not enlarge on this order of denial in his supporting affidavit. The fact of the matter is that he is again seeking repossession of the apartment which was denied in Judge Tenney's order of May 2, 1974.

It is also interesting to note in paragraph 9 of the plaintiff's affidavit that he states that "no previous application has been made for the same or similar relief except one prior motion for partial summary judgment on the issue of liability alone". As I have already pointed out, he has failed to refer to the prior motion (sic) for a preliminary injunction seeking the return of the subject apartment which was denied in Judge Tenney's order of May 2, 1974.

Rather than prepare and repeat the voluminous affidavits which were presented in opposition to the first motion for injunctive relief and the return of

AFFIDAVIT OF MURRAY SPELLMAN, SWORN TO NOVEMBER 5TH,
1974, IN OPPOSITION TO MOTION

the apartment, your deponent most respectfully requests that all of the affidavits previously submitted be incorporated by reference on this motion. The memorandum decision of Judge Tenney entered herein on May 2, 1974 denies plaintiff's motion for a preliminary injunction. I quote from the second paragraph on page 6 of the decision:

"In view of the rather strained relationship that appears to have existed between Ellison and Cumming, it cannot be said that Cumming has shown a strong likelihood of success on the merits. He has made a limited showing of probably success, but there are substantial issues requiring further inquiry. Since the injury to Ellison, if the relief were granted, outweighs the harm to him, if the relief were denied, his application for a preliminary injunction must be denied."

Subsequently, plaintiff made another motion for summary judgment on the issue of liability alone. I most respectfully refer to the order of Judge Tenney dated June 26, 1974 and filed on June 27, 1974 which denied plaintiff's motion. In essence this order found that there was a triable issue of fact, and the matter should be left to the trier of the facts.

Nothing new has been added to plaintiff's present moving papers which would in any way change the

EXHIBIT C ANNEXED TO REPLY AFFIDAVIT OF ULMONT O. CUMMING, JR.,
AFFIDAVIT OF MURRAY SPELLMAN, SWORN TO NOVEMBER 5TH,
1974, IN OPPOSITION TO MOTION

posture of the pleadings other than it is still a question of fact and the contentions of the parties should be resolved by the trier of the facts.

The plaintiff addressed a letter to your deponent dated October 18, 1974 asserting that an apartment on the first floor was vacant and could be available to the defendant. I discussed this matter with Miss Ellison who told me that this is a one bedroom apartment, more than she needs for her own accommodations and furthermore the rental income from this apartment is necessary and vital to her continued operation of the building. This apartment has already been rented.

Miss Ellison's health has certainly not been improved by the worry and stress of the present litigation and proliferation of motions. As I have already stated, Miss Ellison suffers from severe arthritis which restricts her movements severely. Miss Ellison is of the opinion that the plaintiff has been waging a campaign of harassment and intimidation designed to force her to a money settlement. I have been advised that in recent months the plaintiff had published

AFFIDAVIT OF MURRAY SPELLMAN, SWORN TO NOVEMBER 5TH,
1974, IN OPPOSITION TO MOTION

in a newspaper an article about this litigation most favorable to him. The writer of this article communicated with Miss Ellison and discussed it with her to make sure she knew about it. The plaintiff has been in communication with various tenants in the building and has boasted to them that he will have one of the finest trial lawyers represent him at the trial of this case; that he has done some research and that A. Spotswood Campbell, Miss Ellison's long time friend and advisor, was in his late 80's and implied that she could not depend on his help much longer; plaintiff also spoke to the super of the building and boasted that he would be repossessing the apartment soon. It is obvious that these harassing tactics have distressed Miss Ellison and aggravated her condition and that the plaintiff's law suit and the motions have caused her extreme worry and expense. I most respectfully refer to the affidavit of A. Spotswood Campbell, Esq. submitted in opposition to the first motion for a preliminary injunction which sets forth in detail the conduct of the plaintiff towards Miss Ellison and the harassment and annoyance that he has caused.

AFFIDAVIT OF MURRAY SPELLMAN, SWORN TO NOVEMBER 5TH,
1974, IN OPPOSITION TO MOTION

Because of the duplication of this motion, the relief which has already been denied, this Honorable Court should assess costs against the plaintiff for the maximum which may be permitted.

WHEREFORE, deponent prays that the motion be denied.

/s/ MURRAY SPELLMAN
Murray Spellman

Sworn to before me this
5th day of November, 1974.

/s/ LEWIS KAUFMAN
Lewis Kaufman
Notary Public, State of New York
No. 41-2049170
Qualified in Queens County
Term Expires March 30, 1975.

REPLY AFFIDAVIT OF ULMONT O. CUMMING, JR., SWORN TO NOVEMBER 8TH,
1974, IN SUPPORT OF MOTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
ULMONT O. CUMMING, JR.,

Plaintiff,

--against--

SELMA ELLISON a/k/a SELMA HERSHFELD,

Defendant.

:

:

:

:

:

No. 74-CIV-84-CHT

REPLY AFFIDAVIT

-----X
STATE OF NEW YORK)
CITY OF NEW YORK) ss.:
COUNTY OF NEW YORK)

ULMONT O. CUMMING, JR., being duly sworn, according to
law, deposes and says:

1. I am the plaintiff, appearing pro se, in the above-entitled action, and with personal knowledge of the facts and circumstances hereinafter set forth, submit this reply affidavit in further support of plaintiff's motion, pursuant to the provisions of Rule 56 of the Federal Rules of Civil Procedure, for a judgment directing the defendant to return possession of the subject apartment to the plaintiff and for partial summary judgment in favor of the plaintiff and against the defendant on the limited issue of the plaintiff's superior right to possession of the subject apartment, upon the ground that there is no genuine defense to plaintiff's cause of action seeking possession of the subject apartment.

REPLY AFFIDAVIT OF ULMONT O. CUMMING, JR., SWORN TO NOVEMBER 8TH,
1974, IN SUPPORT OF MOTION

2. Defendant's counsel claims that this is the third motion which the plaintiff has made for the same relief. This is not true. Plaintiff's first motion was for a preliminary injunction. Plaintiff's second motion was for partial summary judgment on the limited issue of the defendant's liability for retaliatory eviction. This third motion seeks partial summary judgment on the limited issue of the plaintiff's superior right to possession of the subject apartment. While the question of the plaintiff's superior right to possession of the subject premises was originally raised in the motion for a preliminary injunction, no previous motion for partial summary judgment has been made on this limited issue.

3. In page two of Mr. Spellman's affidavit in opposition, a quotation is taken out of context from the memorandum of Judge Tenney entered herein on May 2nd, 1974. At that time the court denied the plaintiff's motion for partial summary judgment on the limited issue of the defendant's liability for retaliatory eviction upon the ground that there was a triable issue of fact created on the question of the defendant's liability for retaliatory eviction upon the ground that there was a triable issue of fact created on the question of the defendant's intent. That triable issue of fact (intent) is not an essential element necessary to establish plaintiff's cause of action for possession of the subject apartment, as explained in greater detail in the briefs submitted with this motion.

REPLY AFFIDAVIT OF ULMONT O. CUMMING, JR., SWORN TO NOVEMBER 8TH,
1974, IN SUPPORT OF MOTION

4. It should be noted that on October 17, 1974, counsel for the plaintiff and the defendant stipulated that this motion for partial summary judgment, originally returnable October 18, 1974, would be adjourned to November 14, 1974 and that the defendant's opposing papers would be served upon the plaintiff personally on November 4, 1974. While the plaintiff accepts the service made by defendant's counsel as personal service, it should be noted that the opposing papers were received by your deponent one day late, on November 5, 1974.

5. A copy of the said stipulation is annexed hereto and made a part hereof as Exhibit A.

6. On October 18, 1974, plaintiff wrote a letter to counsel for defendant indicating that plaintiff noted that the rear apartment on the first floor of the subject premises had become vacant; that such premises appeared to be ideally suited for the defendant in view of the fact that it is located on the first floor of the subject building and would thereby obviate the necessity of the defendant's having to walk up stairs; that the apartment involved had a bathtub and therefore was suitable for the defendant's medical problem requiring a Sitz bath; and that we recommended that that apartment not be rented pending the hearing and disposition of this

REPLY AFFIDAVIT OF ULMONT O. CUMMING, JR., SWORN TO NOVEMBER 8TH,
1974, IN SUPPORT OF MOTION

motion which was served upon defense counsel on September 27, 1974. A copy of this letter is annexed hereto and made a part hereof as Exhibit B.

7. On page three of the opposing affidavit of Murray Spellman, there is inserted in pen a sentence that "This apartment has already been rented."

8. Also submitted in support of this pending motion is the affidavit of Maria B. Wolff, duly sworn to the 25th day of October, 1974. In her affidavit, Mrs. Wolff states that on October 21st, 1974, twenty-four days subsequent to the service of notice of this instant motion, and three days subsequent to the service of deponent's letter to Mr. Spellman, she visited the defendant at her apartment located at 42 East 64th Street in New York City, and was informed by the defendant that the apartment was vacant and available. Mrs. Wolff indicates in her affidavit that the defendant offered the apartment to her at a monthly rental of \$400.00. It is therefore apparent that this apartment has been rented by the defendant subsequent to October 21, 1974.

9. At this time, reference is made to a document contained in the court file as Exhibit B to the affidavit of A. Spottsworth Campbell, sworn to on April 16, 1974 and submitted to this

REPLY AFFIDAVIT OF ULMONT O. CUMMING, JR., SWORN TO NOVEMBER 8TH,
1974, IN SUPPORT OF MOTION

Honorable Court in support of the defendant's prior cross-motion for judgment dismissing plaintiff's cause of action. A copy of this Exhibit is annexed hereto and made a part hereof as Exhibit C. The court will note that Dr. Morris Block of 75 East 55 Street, New York, New York 10022 has stated that Miss Selma Ellison is physically weak and unable to climb three flights of stairs. The apartment which became vacant, therefore, would require walking up no stairs in order to gain admittance and should be physically ideal for Miss Ellison.

10. Mr. Spellman makes reference to an article published in Our Town, a weekly newspaper, about this litigation. It should be noted that plaintiff did not cause this article to be published although plaintiff submitted to an interview requested by the newspaper's editor. Further, we have been informed by the editor of the paper and the article indicates that Miss Ellison was asked for her side of the story and that she refused to discuss the matter.

11. Plaintiff denies categorically that he has been in communication with any tenants in the subject building and any of the statements alleged to have been made to those tenants are denied. The plaintiff has not been engaged in any attempt to harrass the defendant; although the plaintiff has been attempting to re-gain possession of his apartment ever since he was illegally evicted therefrom.

REPLY AFFIDAVIT OF ULMONT O. CUMMING, JR., SWORN TO NOVEMBER 8TH,
1974, IN SUPPORT OF MOTION

12. At this time, the furniture belonging to the plaintiff which was previously located in the subject apartment is still in storage in Brooklyn and the plaintiff is residing in a furnished apartment on the West Side of Manhattan. Plaintiff has just been advised that he will no longer have use of the furnished apartment on the West Side of Manhattan and that the lady from whom he rented the apartment wishes to use the furniture herself.

13. The plaintiff has not established a permanent residence to this date because he has been hoping and praying that this Court would award him possession of the apartment in which he lived for some fourteen years.

14. It is respectfully submitted that there is no genuine defense to the plaintiff's cause of action for possession of the subject apartment in view of the fact that all of the essential elements of the cause of action are admitted. There is no question in this motion as to balancing of the equities because this is not a motion for a preliminary injunction. Upon the facts and circumstances hereinbefore set forth, as well as all of the other facts and circumstances submitted in support of this motion, it is respectfully requested that this Court grant summary judgment in favor of the plaintiff and against the defendant on the limited issue of the plaintiff's clear right to possession of the subject apartment.

REPLY AFFIDAVIT OF ULMONT O. CUMMING, JR., SWORN TO NOVEMBER 8TH,
1974, IN SUPPORT OF MOTION

WHEREFORE, I respectfully pray that this court enter an appropriate award and that the tenant be permitted to re-gain possession of his apartment.

/s/ ULMONT O. CUMMING, JR.
ULMONT O. CUMMING, JR.

Sworn to before me this

8th day of November, 1974.

/s/ HERMAN A. STUHL
HERMAN A. STUHL
Notary Public, State of New York
No. 31-9230450
Qualified in New York County
Commission Expires March 30, 1976.

EXHIBIT A ANNEXED TO REPLY AFFIDAVIT OF ULMONT O. CUMMING, JR.,
SWORN TO NOVEMBER 8TH, 1974, IN SUPPORT OF MOTION -- STIPULATION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
ULMONT O. CUMMING, JR., :
Plaintiff, : No. 74-CIV-84-CHT
--against-- : STIPULATION
SELMA ELLISON, :
Defendant. :
-----x

IT IS HEREBY STIPULATED AND AGREED by and between ULMONT O. CUMMING, JR., plaintiff, Pro Se, and NEWMAN, ARONSON & NEUMANN, attorneys for the defendant SELMA ELLISON, that the motion for partial summary judgment returnable in Room 1904 of the Courthouse thereof, located at Foley Square, City, County and State of New York, on the 18th day of October, 1974 at 10:00 o'clock in the forenoon of that day, be and the same is hereby adjourned to the 14th day of November, 1974, at the same time and place, and it is

FURTHER STIPULATED AND AGREED that the answering affidavit of the defendant, SELMA ELLISON, shall be served personally on the plaintiff, Pro Se on or before November 4, 1974.

Dated: New York, New York
October 17, 1974

/s/ NEWMAN, ARONSON & NEUMANN
NEWMAN, ARONSON & NEUMANN
Attorneys for the Defendant
350 Fifth Avenue
New York, New York 10001
695-5575

EXHIBIT A ANNEXED TO REPLY AFFIDAVIT OF ULMONT O. CUMMING, JR.,
SWORN TO NOVEMBER 8TH, 1974 , IN SUPPORT OF MOTION -- STIPULATION

/s/ ULMONT O. CUMMING, JR.

ULMONT O. CUMMING, JR.

Plaintiff Appearing Pro Se

c/o N.Y.I.L.R. Limited

14 East 60th Street

New York, New York 10022

Tel: (212) 421-1644

EXHIBIT B ANNEXED TO REPLY AFFIDAVIT OF ULMONT O. CUMMING, JR., SWORN
TO NOVEMBER 8th, 1974, IN SUPPORT OF MOTION -- LETTER FROM ULMONT O.
CUMMING, JR., DATED OCTOBER 18th, 1974, TO MURRAY SPELLMAN

Ulmont O. Cumming, Jr.
c/o NYILR, Limited
14 East 60th Street
New York, New York 10022

October 18, 1974

Murray Spellman, Esq.
Messrs. Newman, Aronson & Neumann
350 Fifth Avenue
New York, New York 10001

In Re: Ulmont O. Cumming, Jr.
v. Selma Ellison a/k/a
Selma Hershfeld

Dear Mr. Spellman:

I note with interest that the rear apartment on the first floor of premises known as and by street No. 42 East 64th Street in the Borough of Manhattan, City, County and State of New York, have become vacant.

Such premises appear ideally suited for your client in view of the fact that they are on the first floor and would thereby obviate the necessity of her having to walk up stairs. Additionally, I am informed by a local pharmacist that Sitz Baths are commercially available for under \$10.00 as an attachment that may be affixed to the commode.

In view of the fact that there is now pending before his Honor Judge Charles A. Tenney a motion for an order requesting your client to surrender possession of the subject apartment to me, I am taking the liberty of calling to your attention the fact that an apartment more to her claimed liking is available in the building and that this fact will be brought to the attention of Judge Tenney on the adjourned return date of the motion.

EXHIBIT B ANNEXED TO REPLY AFFIDAVIT OF ULMONT O. CUMMING, JR., SWORN
TO NOVEMBER 8th, 1974, IN SUPPORT OF MOTION -- LETTER FROM ULMONT O.
CUMMING, JR., DATED OCTOBER 18th, 1974, TO MURRAY SPELLMAN

-2-

Accordingly, it is your descretion as to whether or not to rent
this apartment out pending the hoaring and disposition of the
pending motion. However, if I were counsel to the defendant, I
would take the more conservative approach.

With every good wish, I remain,

Very truly yours,

Ulmont O. Cumming, Jr.

EXHIBIT C ANNEXED TO REPLY AFFIDAVIT OF ULMONT O. CUMMING, JR.,
SWORN TO NOVEMBER 8th, 1974, IN SUPPORT OF MOTION -- STATEMENT
BY DR. MORRIS BLOCK DATED FEBRUARY 15th, 1972

C O P Y

DR. MORRIS BLOCK
78 EAST 53 STREET
NEW YORK, N. Y. 10022

February 15, 1972

To Whom It May Concern:

Miss Selma Ellison has had bilateral
mastectomy for cancer of both breasts. She is
physically weak and unable to climb three flights
of stairs.

Yours truly,

Morris Block, M.D.
C.H.

MB:ch

SUPPLEMENTAL REPLY AFFIDAVIT OF ULMONT O. CUMMING, JR., SWORN TO
NOVEMBER 9TH, 1974, IN SUPPORT OF MOTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
:
ULMONT O. CUMMING, JR.,
:
Plaintiff,
:
--against--
:
SELMA ELLISON a/k/a
:
SELMA HERSHFELD,
:
Defendant.
:
-----x

SUPPLEMENTAL REPLY
AFFIDAVIT

STATE OF NEW YORK)
ss.:
COUNTY OF NEW YORK)

ULMONT O. CUMMING, JR., being duly sworn, according to
law, deposes and says:

1. That I make this supplemental reply affidavit in
further support of the within motion.
2. That it should be noted that when Miss Ellison pre-
vailed in the Civil Court of the City of New York upon her eviction
proceeding against me, she shoose (sic) to evict me pending appeal
knowing full well that I may prevail upon appeal, as I eventually
did.

SUPPLEMENTAL REPLY AFFIDAVIT OF ULMONT O. CUMMING, JR., SWORN TO
NOVEMBER 9TH, 1974, IN SUPPORT OF MOTION

3. Now that I have made this motion for partial summary judgment on the issue of the right to possession of the subject apartment, Miss Ellison chooses to rent to another the vacant apartment on the first floor of her building so that should I prevail on this motion she would have no place within the building to move.

4. Accordingly, I respectfully submit that this Court should treat the situation as if Miss Ellison voluntarily relinquished her residence to the tenant on the first floor to whom she just rented her apartment.

WHEREFORE, I respectfully pray that the relief requested be granted.

/s/ ULMONT O. CUMMING, JR.
ULMONT O. CUMMING, JR.

Sworn to Before Me This
9th Day of November 1974.

/s/ HERMAN A. STUHL
HERMAN A. STUHL
Notary Public, State of New York
No. 31-9230450
Qualified In New York County
Commission Expires March 30, 1976

AFFIDAVIT OF MARIA B. WOLFF, SWORN TO OCTOBER 25TH, 1974 --
IN SUPPORT OF MOTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
ULMONT O. CUMMING, JR., :
 :
Plaintiff, : AFFIDAVIT
 :
--against-- :
SELMA ELLISON a/k/a SELMA HERSHFEID, :
 :
Defendant. :
-----x

STATE OF NEW YORK)
CITY OF NEW YORK) ss.:
COUNTY OF NEW YORK)

MARIA B. WOLFF, being duly sworn, according to law,
deposes and says:

1. On October 21st, 1974, deponent visited with the
defendant at her apartment located at No. 42 East 64th Street
in the Borough of Manhattan, in the City, County and State of
New York.

2. On the occasion of this visit, I spoke with the
defendant who advised me that the rear apartment on the first
floor of said premises was vacant. The defendant offered this
apartment to me for rental at the rate of \$400.00 per month,
indicating that occupancy could be immediate.

AFFIDAVIT OF MARIA B. WOLFF, SWORN TO OCTOBER 25TH, 1974 --
IN SUPPORT OF MOTION

3. I inspected the apartment and noted that it was vacant at the time, totally devoid of furniture. The apartment was located on the ground floor and did not occasion the necessity of walking up any stairs. It had a full bathroom, complete with a bathtub, a living room, a bedroom and a kitchen.

4. When I first met the defendant, she assumed that I had learned about the vacant apartment through a broker who apparently is handling this rental for her.

WHEREFORE, I respectfully pray that this Honorable Court take this information into consideration in determining the pending motion.

/s/ MARIA B. WOLFF

MARIA B. WOLFF

Sworn to before me this
25th day of October, 1974

/s/ HERMAN A. STUHL

HERMAN A. STUHL
Notary Public, State of New York
No. 31-9230450
Qualified in New York County
Commission Expires March 30, 1973

ORDER APPEALED FROM

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x

ULMONT O. CUMMING, JR.,

Plaintiff,

--against--

SELMA ELLISON a/k/a SELMA
HERSHFELD,

Defendant.

: 74 Civ. 84 (CHT)

:

MEMORANDUM

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TENNEY, J.

This Court having previously denied his motions for a preliminary injunction^{1/} and for summary judgment on the issue of liability,^{2/} plaintiff moves once again for a partial summary judgment on the issue of his right to possession of an apartment owned by the defendant. For the reason stated below, this motion is denied.

The amended complaint, like the original complaint, states a claim for retaliatory eviction under 6 C.F.R. Section 301.502(f), a regulation promulgated under the Economic Stabilization Act of 1970,

ORDER APPEALED FROM

as amended (Public L. No. 92-210, 85 Stat. 743) ("the Act"). (Amended Complaint, paragraphs 26-32.) The instant motion, however, is grounded upon another regulation promulgated under the Act, 6 C.F.R. Section 301.208(b)(1) and (2).^{3/} While that regulation is mentioned in the amended complaint (id., paragraphs 11, 21, 25), it is not cited as the basis for a claim for relief.

Fed. R. Civ. P. 56(a) provides in pertinent part that:

"(a) party seeking to recover upon a claim . . . may . . . move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof." (Emphasis supplied.)

The claim upon which one seeks judgment "must have been asserted in the action, normally by a pleading, before summary judgment thereon is proper." 6 Moore's Federal Practice Section 56.07 at 2093.

Since the "claim" upon which plaintiff now seeks summary judgment has never been asserted as a claim for relief in the complaint or the amended complaint, the Court must deny plaintiff's motion. Plaintiff apparently hoped that, by seeking summary

ORDER APPEALED FROM

judgment under 6 C.F.R. Section 301.208(b)(1) and (2), rather than under 6 C.F.R. Section 301.502(f), he could avoid the necessity of establishing at trial that defendant's intent in evicting him was retaliatory in nature. It was on the ground that there was a material dispute as to the issue of retaliatory intent that this Court denied plaintiff's first motion for summary judgment. To now permit plaintiff to circumvent proof of that issue by asking for judgment on a different theory, particularly where that theory has never before been asserted as a claim for relief, would not serve the ends of justice.

Accordingly, plaintiff's motion for partial summary judgment is hereby denied.

So ordered.

Dated: New York, New York
December 12, 1974

/s/ CHARLES H. TENNEY
U.S.D.J.

ORDER APPEALED FROM

ULMONT O. CUMMING, JR.,
Plaintiff,

74 Civ. 84 (CHT)

--against--
SELMA ELLISON a/k/a SELMA
HERSHFELD,
Defendant.

FOOTNOTES

1/ May 1, 1974.

2/ June 26, 1974.

3/ As the Court understands it, plaintiff is claiming in the instant motion that he was wrongfully evicted from defendant's apartment because defendant failed to offer him a renewal lease, as mandated by 6 C.F.R. Section 301.208(b)(1) and (2). He therefore argues that he has a superior right of possession to that apartment. The failure to offer plaintiff a renewal lease, is not, however, the gravamen of plaintiff's amended complaint. The amended complaint is clearly based upon the theory that defendant wrongfully evicted plaintiff from the apartment for having made a complaint to the Internal Revenue Service regarding a rent increase. The Court is of the opinion that before plaintiff can move for summary judgment under 6 C.F.R. Section 301.208 (b)(1) and (2), he would have to amend his complaint in accordance with Fed. R. Civ. P. 15.

NOTICE OF APPEAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x

ULMONT O. CUMMING, JR.,	:	
	:	
Plaintiff,	:	No. <u>74-CIV-84-CHT</u>
	:	
--against--	:	
	:	
SELMA ELLISON a/k/a SELMA HERSHFELD,	:	<u>NOTICE OF APPEAL</u>
	:	
Defendant.	:	

-----x

S I R S :

NOTICE IS HEREBY GIVEN that ULMONT O. CUMMING, JR., plaintiff above-named, hereby appeals to the United States Court of Appeals for the Second Circuit from the order entered in this action on the 12th day of December, 1974, denying plaintiff's motion for summary judgment, and the plaintiff hereby appeals from each and every part of the said order as well as from the whole thereof.

Dated, New York, New York, this 16th day of December, 1974.

Yours, etc.

/s/ Ulmont O. Cumming, Jr.

ULMONT O. CUMMING, JR.,
Plaintiff Pro Se
Office & P.O. Address
c/o NYILR, Limited
14 East 60th Street, Suite 502
New York, New York 10022
Telephone: (212) 421-1644

TO: MESSRS. NEWMAN, ARONSON & NEUMANN
350 Fifth Avenue
New York, New York 10001

Attorneys for the Defendant

RELEVANT DOCKET ENTRIES

<u>DATE</u>	<u>PROCEEDINGS</u>
January 1st, 1974	Filed complaint and issued summons.
February 6th, 1974	Filed summons with Marshal's return. Served Selma Ellison by Attorney Murray Spellman, authorized to accept service on 1/30/74.
February 28th, 1974	Filed Answer of Defendant.
March 29th, 1974	Filed Plaintiff (Pro Se) Affidavit & Notice of Motion for leave to serve and file Amended Complaint.
April 12th, 1974	Filed Memo End. on Notice of Motion for leave to serve and file an amended complaint. Motion granted, Tenney, J.
April 17th, 1974	Filed Plaintiff Pro Se Amended Complaint & Jury Trial Requested.
April 29th, 1974	Filed Defendant's Amended Answer.
November 12th, 1974	Filed Plaintiff (Pro Se) Reply Affidavits in support of motion for judgment.
November 12th, 1974	Filed Reply Memorandum of Law in support of Plaintiff's motion for partial summary judgment on issue of plaintiff's superior right to possession of subject apartment.
December 12th, 1974	Filed Opinion #41571. Accordingly Plaintiff's motion for partial summary judgment is hereby denied. Tenney, J. (mn)
December 19th, 1974	Filed Defendant's affidavit in opposition to motion by plaintiff for an order directing defendant's return possession of subject apartment to plaintiff and that partial summary judgment be granted on issues of right of possession of subject apartment, etc., as indicated.

RELEVANT DOCKET ENTRIES

<u>DATE</u>	<u>PROCEEDINGS</u>
December 19th, 1974	Filed Memorandum of Law in support of plaintiff's motion for partial summary judgment on issue of superior right to possession of subject apartment.
December 19th, 1974	Filed Plaintiff's Notice of Motion for partial summary judgment.
December 19th, 1974	Filed Stipulation & Order that motion for partial summary judgment returnable in Room 1904 on 10/18/74 at 10:00 o'clock is adjourned to 11/14/74; answering affidavit of Defendant Selma Ellison shall be served personally on plaintiff on or before 11/4/74. Tenney, J.
December 27th, 1974	Filed Plaintiff's notice of appeal to the USCA from order entered 12/12/74. Mailed copy to Newman, Aronson & Neumann.

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
CITY OF NEW YORK : ss.:
COUNTY OF NEW YORK)

MARIA B. WOLFF, being duly sworn,
according to law, deposes and says:

1. Deponent is not a party to the within action or proceeding, is over twenty-one (21) years of age, and resides in the City, County and State of New York.

2. On January 22nd, 1975, deponent served the within
JOINT APPENDIX _____ upon Messrs. Newman,
Aronson & Neumann, attorney(s) for Defendant-Appellee
_____ in this action or proceeding at 350 Fifth
Avenue, New York, New York 10001, the address designated by
said attorney(s) for the purpose, by depositing a true copy of same
enclosed in a post-paid properly addressed wrapper in an official depos-
itory under the exclusive care and custody of the United States Postal
Service within the City, County, and State of New York.

MARIA B. WOLFF

Sworn to before me this

22nd day of January, 1975.

Notary Public, State of New York
No. 31-9270150
Qualified in New York County
Commission Expires March 30, 1997

